No. 86-228

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

JUOZAS KUNGYS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE WORLD JEWISH CONGRESS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT UNITED STATES

ELI M. ROSENBAUM
(Counsel of Record)
General Counsel
WORLD JEWISH CONGRESS
One Park Avenue
New York, New York 10016
(212) 679-0600
Counsel for Amicus Curiae

Of Counsel
ROBERT H. LANDE
MICHELE L. CYDULKA
JONES, DAY, REAVIS & POGUE
655 15th Street, N.W.
Washington, D.C. 20005
(202) 879-3939

March 4, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-228

JUOZAS KUNGYS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

MOTION OF THE WORLD JEWISH CONGRESS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT UNITED STATES

The World Jewish Congress, pursuant to Rule 36.3, hereby moves for leave to file the attached brief *amicus curiae* supporting the respondent in *Kungys v. United States*, No. 86-228. Consent to file this brief has been obtained from counsel for respondent; a letter expressing that consent has been lodged with the Clerk of the Court. *Amicus* tried to obtain petitioner's consent, but was unsuccessful. Because *amicus* has been unsuccessful in its efforts to obtain consent from the petitioner, this motion is necessary.

The background and concerns of *amicus* are fully set forth in the Interest of *Amicus Curiae* section of the attached brief. In sum, the World Jewish Congress has long been active in combatting racial and religious persecution and in ensuring that the United States immigration laws are fairly implemented and interpreted, particularly with a view toward rescuing the victims of such persecution. *Amicus* thus has a special interest in assisting the Court to interpret and enforce the immigration laws so that they are used to confer immigrant status and citizenship only upon those individuals whom the United States Congress has decided are worthy of receiving same. In particular, *amicus* believes that U.S. immigration laws were not intended to grant these privileges to individuals who, like petitioner, make material misrepresentations in their applications for immigration and naturalization and who masquerade as victims of Nazi persecution.

Amicus believes that misrepresentations of fact willfully made by petitioner in his visa application and in his petition for citizenship were demonstrably material and, accordingly, that his citizenship must be revoked. *Amicus* submits that the standard of "materiality" advocated by petitioner threatens the integrity and orderly operation of an immigration system that has rescued millions of people from ongoing or threatened racial, religious or political persecution.

Amicus brings to the issues in this case experience and perspectives likely to be different from those of the parties. This is especially true since many members of *amicus*' constitutent organizations are escapees from Nazi persecution who later were lawfully admitted to U.S. residence and citizenship, and/or are relatives of people who lost their lives as a consequence of World War II crimes similar to those that petitioner is alleged to

have committed. *Amicus* now respectfully seeks the Court's leave to file the attached brief on the merits.

Respectfully submitted,

ELI M. ROSENBAUM
(Counsel of Record)
General Counsel
WORLD JEWISH CONGRESS
One Park Avenue
New York, New York 10016
(212) 679-0600
Counsel for Amicus Curiae

Of Counsel
ROBERT H. LANDE
MICHELE L. CYDULKA
JONES, DAY, REAVIS & POGUE
655 15th Street, N.W.
Washington, D.C. 20005
(202) 879-3939

March 4, 1987

QUESTIONS PRESENTED

1. Whether, under the "second prong" of *Chaunt v. United States*, 364 U.S. 350 (1960), the government, in order to prove that a misrepresentation or concealment is "material" under 8 U.S.C. 1451(a), must prove the existence of ultimate facts warranting denial of citizenship, or instead may prevail upon proving that the true facts, or discovery of the concealment or misrepresentation, would have prompted an investigation possibly leading to the discovery of specific facts, which facts were capable of influencing the decision on the applicant's visa application or naturalization petition.

2. Whether certain misrepresentations of fact willfully made by petitioner in his visa application and in his citizenship petition and allied documents are "material," hence requiring his denaturalization under 8 U.S.C. 1451(a).

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS:

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS: Page

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-228

JUOZAS KUNGYS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF THE WORLD JEWISH CONGRESS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT UNITED STATES

INTEREST OF AMICUS CURIAE

The World Jewish Congress ("WJC") is a not-for-profit voluntary association of representative Jewish organizations and national communities throughout the world. Many members of its constituent groups are victims of Nazi persecution and/or are relatives of persons who lost their lives as a consequence of World War II crimes similar to those petitioner is alleged to have committed. The WJC's constitution, adopted in 1936, provides that the organization exists to, *inter alia*, "foster the unity of the Jewish people, . . . ensure the continuity

and development of its religious, spiritual, cultural and social heritage . . . [and] to cooperate with all peoples on the basis of universal ideals of peace, freedom, and justice." The WJC has a long tradition of combatting racial and religious persecution and prejudice and of fighting for universal respect for human and political rights.

The United States has traditionally been a haven for refugees from persecution and intolerance in other lands. As noted by the Third Circuit Court of Appeals, petitioner herein procured his immigration to the United States by masquerading as a victim of Nazi persecution and by willfully misrepresenting and concealing his true identity and wartime whereabouts and activities. Petitioner himself is alleged to have been a participant in Nazi-sponsored acts of persecution, including mass murder. He would now have this Court validate his fraudulent entry and the U.S. citizenship he later obtained on the basis of that entry.

Amicus strongly believes that the position advanced by petitioner makes a mockery of the rule of law, debases the suffering of the true victims of the Nazi regime, and threatens fundamentally the integrity and the orderly operation of the United States immigration system, one that has rescued millions of innocent people from the clutches of those who would persecute, enslave and even kill them.

SUMMARY OF ARGUMENT

I.

A. Citizenship that is procured either illegally or through a willful misrepresentation or concealment of a material fact must be revoked under the Immigration and Nationality Act of 1952, 8 U.S.C. 1451(a). As the Third Circuit correctly held below, petitioner's citizenship must be revoked because it was procured by willful misrepresentations and concealments of material facts.

In the leading case on the definition of "material" under this statute, the Court held that concealed or misrepresented facts are material if they either would have been sufficient to warrant denial of citizenship (the test's "first prong") or their disclosure "*might* have been useful in an investigation *possibly* leading to the discovery of other facts warranting denial of citizenship" (the "second prong"). *Chaunt v. United States*, 364 U.S. 350, 355 (1960) (emphasis added).

Petitioner's argument that the "second prong" of *Chaunt* requires proof of an ultimate disqualifying fact goes against the nearly unanimous weight of judicial authority, is contrary to the best judgment of all leading commentators, would render the fraud provision of 8 U.S.C. 1451(a) entirely superfluous, and would actually encourage fraud, thereby dealing a grievous blow to Congress' demonstrated intent to discourage fraud in immigration and naturalization proceedings.

The vague and imprecise language of *Chaunt* has caused much confusion as to precisely what the government must prove, short of an ultimate disqualifying fact, in order to prevail. Courts have consistently avoided articulating a specific standard or test to be used in applying the second prong of *Chaunt* to cases of willful misrepresentations or concealments unaccompanied by conclusive proof of ultimate disqualifying facts.

B. *Amicus* submits that the proper standard can and should be fashioned from the extensive body of jurisprudence on the meaning of the expression "material misrepresentation" in analogous areas of federal law, where Congress, as in 8 U.S.C. 1451(a), has failed to provide its own definition. The basic materiality test that has long predominated throughout federal law has proven fair, workable and free of confusion. That test, in such areas as securities law and criminal law (including, most comparably, prosecutions for visa fraud), requires proof that the willfully misrepresented or concealed fact was

"capable of influencing" the decision in question. Applied to the second prong of *Chaunt*, the test would deem misrepresented facts material if the true facts (or discovery of the misrepresentation) would have prompted an investigation possibly leading to the discovery of specific facts, which facts were capable of influencing the decision on the applicant's visa application or naturalization petition.

Because the criminal statutes provide criminal sanctions, their definition of "material" should, if anything, be *narrower* than the definition used in the immigration field. To hold otherwise would lead to the absurd result that one who willfully makes an important misrepresentation in the course of applying for immigration could be immune from the civil consequence of denaturalization while subject to criminal penalties, including imprisonment, for the very same misrepresentation.

The test proposed by *amicus* is fully consistent with the language of the second prong of *Chaunt* and with the pre-*Chaunt* rule (which required proof of misrepresented or concealed facts that forestalled an investigation relevant to eligibility). It is, moreover, faithful to the Court's instruction in *Chaunt* itself that the "totality of the circumstances" should be taken into consideration when assessing materiality and to the common sense understanding that a "material" fact is one that is "important" to the decision-making process. The test, by definition, would still protect persons who make minor or unimportant, albeit willful, misrepresentations. Moreover, the expression "capable of influencing the decision" presumes the existence of a reasonable basis for the official's decision under the substantive provisions of the immigration and naturalization laws.

II.

Applying the appropriate standard, it is clear that petitioner's willful misrepresentations were material under the second prong of *Chaunt*. Because the district

court excluded from evidence the testimony of eyewitnesses identifying petitioner as a participant in the 1941 mass killing of unarmed Jewish civilians at Kedainiai in Nazi-occupied Lithuania, the court was unable to determine conclusively whether he had taken part in these killings. However, the court, while acknowledging that enormous difficulties are involved in proving details of events that took place in wartime Europe, held that the government's investigation, conducted four decades after the fact, had actually succeeded in locating witnesses whose testimonies provide "strong support" for the charge of petitioner's complicity in the massacre, and that the government "might have" proved this charge at trial had the depositions been admitted in evidence. In its subsequent decision denying petitioner's motion for an award of attorneys' fees, the court further held that the government had had a "reasonable basis" for believing that it could prove its charges at trial by the requisite "clear, unequivocal and convincing" proof that "does not leave the issue in doubt."

Former U.S. officials gave unrebutted testimony at trial that had petitioner's misrepresentations been discovered when petitioner applied for immigration (1947) or citizenship (1953), at a minimum an investigation would certainly have been commenced. It follows naturally that if the government's investigation commenced forty years after the war could uncover such strong evidence of petitioner's participation in mass killings, then an investigation conducted so soon after the war would have been even more likely to have found, at a minimum, the same "strong evidence" providing a "reasonable basis" for concluding that petitioner participated in Nazi atrocities, and hence that he was ineligible for immigration (under federal regulations barring such aliens from entry) and for citizenship as well (under federal statutes prohibiting the admission to citizenship of persons who entered the country unlawfully or who lack the requisite good moral character). Moreover, this

"strong evidence" of involvement in Nazi atrocities would have provided an alternate "reasonable basis" for concluding that petitioner had failed to satisfy his burden of proving that he was eligible to enter the United States, as non-preference visas were to be issued only to "victims of Nazi persecution."

The foregoing facts are plainly "material" under the definition of "materiality" employed in all analogous areas of federal law—which, as demonstrated above, is the definition that should govern the application of *Chaunt* as well. A reasonable vice-consul or naturalization examiner—*i.e.*, one who was making a good faith effort to enforce U.S. law—would surely have found them to be, at the very least, "important" and "capable of influencing" his decision.

ARGUMENT

PETITIONER SHOULD BE DENATURALIZED BECAUSE OF HIS WILLFUL MISREPRESENTATIONS OF MATERIAL FACTS

This brief will not discuss a number of issues that *amicus* expects will be ably addressed in the government's brief.[1] This brief will focus instead on what *amicus*

---

[1] One of these concerns the applicability to the visa application stage of the same test of materiality that applies to the citizenship petition stage. Another issue is the correctness of the standard of review employed by the Third Circuit in reviewing the district court's factual findings. *Amicus* wishes to associate itself fully with the views advanced by the government on both of these questions throughout the proceedings. *Amicus* similarly supports and will not seek to duplicate respondent's argument that the Third Circuit was correct in concluding that the government succeeded at trial in proving what the Court of Appeals characterized as "the *disqualifying fact* that the defendant had not been a victim of Nazi persecution and therefore would not have been eligible for a visa" (*United States v. Kungys*, 793 F.2d 516, 531 (3d Cir. 1986) (emphasis added)), and that had petitioner told the truth, the discrepancies disclosed thereby would at least have resulted in an investigation that would "in all probability . . . have revealed" this fact and consequently "would have probably resulted in the denial of his

believes is the central question before the Court in this case—whether the so-called "second prong" of the materiality test of *Chaunt v. United States*, 364 U.S. 350 (1960), requires proof of ultimate facts warranting denial of citizenship. *Amicus* submits that it does not and that the second prong of *Chaunt* is satisfied when the government proves, by "clear, unequivocal and convincing evidence" that does not "leave the issue in doubt," that disclosure of the true facts or discovery of the misrepresentation or concealment would have prompted an investigation possibly leading to the discovery of specific facts, which facts were "capable of influencing" the decision on the applicant's visa application or naturalization petition.

I. A MISREPRESENTED FACT IS MATERIAL IF DISCLOSURE OF THE TRUTH MIGHT HAVE BEEN USEFUL IN AN INVESTIGATION POSSIBLY LEADING TO THE DISCOVERY OF OTHER FACTS WARRANTING DENIAL OF CITIZENSHIP

A. The Materiality Standard of 8 U.S.C. 1451(a) Does Not Require Proof of Ultimate Facts Warranting Denial of Citizenship

1. This case involves a suit brought by the government to revoke petitioner's United States citizenship pursuant to Section 340(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1451(a), which establishes two separate grounds for denaturalization: (1) illegal procurement (*i.e.*, the applicant lacked one or more of the statutory prerequisites for citizenship at the time the petition for naturalization was granted)[2] or (2) willful concealment or misrepresentation of a material fact. *Chaunt v. United States*, 364 U.S. 350 (1960), is the leading case on what constitutes a "material" misrepresentation or concealment under that statute. In *Chaunt*,

---

[petition for naturalization] . . . ." *Id.* at 531 (citing *Chaunt v. United States*, 364 U.S. 350 (1960)).

[2] *Fedorenko v. United States*, 449 U.S. 490 (1981).

the Court held that concealed or misrepresented facts are material under 8 U.S.C. 1451(a) if they meet either of two tests: (1) the concealed or misrepresented facts, if known, would have warranted denial of citizenship or (2) "their disclosure *might* have been useful in an investigation *possibly* leading to the discovery of other facts warranting denial of citizenship." 364 U.S. at 355 (emphasis added).

The first *Chaunt* test places a severe burden on the government to prove the existence of ultimate facts demonstrating that a person is ineligible for citizenship. Petitioner would have the Court hold that the second *Chaunt* test, like the first one, requires proof of an ultimate disqualifying fact. Plainly, this is not so.

The manifest purpose of the second *Chaunt* test is to permit denaturalization on the basis of fraud without the necessity of proving conclusively that the individual was ineligible for citizenship. This is not only the most logical explanation for the inclusion of the words "might" and "possibly" in the second *Chaunt* test, but it is also the only one that would avoid making the fraud portion of the denaturalization statute redundant, contrary to the axiom that a statute should not be construed in a manner that "render[s] one part inoperative." *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). Adoption of petitioner's standard would make the fraud provision superfluous; having proved an ultimate disqualifying fact, the government would, by definition, have established illegal procurement and would, therefore, never need to offer proof of any misrepresentation or concealment.

Prior to *Chaunt*, courts consistently held that misrepresentations were material whenever they forestalled an investigation relevant to eligibility.[3] Significantly, *Chaunt*

---

[3] *See, e.g., United States v. Montalbano*, 236 F.2d 757, 759-60 (3d Cir.), *cert. denied*, 352 U.S. 952 (1956) (facts "relating" to eligibility); *Corrado v. United States*, 227 F.2d 780, 784 (6th Cir. 1955), *cert. denied*, 351 U.S. 925 (1956) (facts "relating to" eligi-

did not purport to disturb this established rule, and the overwhelming weight of judicial authority since *Chaunt*, together with all the leading commentators, agree that *Chaunt* does not require the government to prove an ultimate disqualifying fact if it proves that the truth would have prompted an investigation relevant to eligibility.[4]

Adoption of petitioner's position that proof of ultimate disqualifying facts is always required would deal a grievous blow to Congress' demonstrated intent to discourage fraud in immigration and naturalization proceedings. If the government is forced to prove the existence of ultimate facts warranting denial of citizenship in every denaturalization proceeding, an applicant would have much to gain and nothing to lose by lying about his background in an effort to avoid an investigation into his past that might lead to a denial of entry or citizenship. Even if the applicant's lie is later discovered, the present case demonstrates in dramatic fashion that the

---

bility); *United States v. Chandler*, 152 F. Supp. 169, 177 (D. Md. 1957) (facts "relating to" eligibility); *United States v. Lumantes*, 139 F. Supp. 574, 575 (N.D. Cal. 1955) (facts "regarding" eligibility); *Ganduxe y Marino v. Murff*, 183 F. Supp. 565, 567 (S.D.N.Y. 1959) ("substantial question as to . . . eligibility") (deportation case).

[4] *See United States v. Palciauskas*, 734 F.2d 625, 628 (11th Cir. 1984); *United States v. Fedorenko*, 597 F.2d 946, 947, 951 (5th Cir. 1979), *aff'd on other grounds*, 449 U.S. 490 (1981); *Kassab v. INS*, 364 F.2d 806, 807 (6th Cir. 1966) (deportation case); *United States v. Oddo*, 314 F.2d 115, 118 (2d Cir.), *cert. denied*, 375 U.S. 833 (1963); *Landgammer v. Hamilton*, 295 F.2d 642, 648 (1st Cir. 1961). *See also* 3 C. Gordon & H. Rosenfield, *Immigration Law and Procedure*, § 20.4b, at 20-14 (rev. ed. 1979); Appelman, *Misrepresentation in Immigration Law: Materiality*, 22 Fed. B.J. 267, 271-72 (1962); Comment, *Misrepresentation and Materiality in Immigration Law—Scouring the Melting Pot*, 48 Fordham L. Rev. 471, 491-93 (1980). The only case that clearly holds otherwise is *United States v. Sheshtawy*, 714 F.2d 1038 (10th Cir. 1983) (ultimate disqualifying facts required), which, for the reasons advanced above, *amicus* submits was incorrectly decided as a matter of law.

passage of time will have made it more difficult for the disqualifying facts to be uncovered and proved. Moreover, in the interim, the burden of proof will have shifted from the applicant to the government, which must demonstrate his or her ineligibility in a denaturalization proceeding by satisfying a burden of proof which the Court has held to be "substantially identical" to the "beyond a reasonable doubt" standard applicable in criminal cases.[5] Fraud would almost always be handsomely rewarded under the interpretation of *Chaunt* urged by petitioner.

2. Clearly, then, the government may prevail upon a showing of something less than an ultimate disqualifying fact. That is, there are two ways to satisfy the second prong of *Chaunt*.[6] No court, however, has ever articulated a *specific standard or test* to be used in applying the second prong of *Chaunt* to cases of willful misrepresentations unaccompanied by conclusive proof of ultimate disqualifying facts. Typically, courts confronting such situations simply repeat verbatim the imprecise wording of the second prong of *Chaunt* and then assert in conclusory terms that the misrepresentation in question was (or was not) "material."[7] The result, as noted by the Third Circuit herein, has been that the second

---

[5] *Klapprott v. United States*, 335 U.S. 601, 612 (1949) (burden on government in denaturalization cases "to prove its charges . . . by clear, unequivocal and convincing evidence which does not leave the issue in doubt . . . . is substantially identical with that required in criminal cases—proof beyond a reasonable doubt").

[6] The second prong of *Chaunt* hence may be seen as having, in effect, two legs—one in which an ultimate disqualifying fact is proved and the other in which some lesser showing suffices. In other words, an ultimate disqualifying fact, if proved, clearly satisfies the second prong of *Chaunt*, and, for the reasons advanced herein, so too does some lesser showing. The nature of this lesser showing is addressed *infra* at I(B).

[7] *See, e.g., Kassab*, 364 F.2d at 807 (deportation case); *United States v. D'Agostino*, 338 F.2d 490, 491 (2d Cir. 1964); *Oddo*, 314 F.2d at 118.

prong of *Chaunt* remains an "elusive concept," [8] and the "confusion" that Justice Blackmun spoke of in *Fedorenko*, 449 U.S. at 521 n.4 (1981) (concurring opinion), continues to reign.[9]

B. A Willful Misrepresentation or Concealment Should Be Deemed "Material" Under 8 U.S.C. 1451(a) if Disclosure of the True Facts or Discovery of the Misrepresentation or Concealment Would Have Prompted an Investigation Possibly Leading to the Discovery of Specific Facts, Which Facts Were "Capable of Influencing" the Decision on the Applicant's Visa Application or Naturalization Petition

1. *Amicus* submits that the proper standard for applying the second prong of *Chaunt* should be fashioned from the extensive body of jurisprudence on the meaning of the expression "material misrepresentation" in analogous areas of federal law. The materiality test that has long predominated throughout federal law has proved fair, workable and free of confusion. Indeed, Congress' failure to provide any definition of "material" in 8 U.S.C. 1451(a) suggests that the word should be given this meaning, its ordinary statutory definition. For example, under Rule 14a-9 promulgated pursuant to Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(a) (prohibiting proxy statements that are "false or misleading with respect to any material fact . . . "), the Court has held that an omitted fact is material if there is a "substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). Similarly, under the

---

[8] *United States v. Kungys*, 793 F.2d 516, 526 (3d Cir. 1986).

[9] Indeed, although the Court granted *certiorari* in *Fedorenko* primarily to resolve questions about the proper interpretation of *Chaunt*, the Court was unable to reach a consensus, and instead decided the case on illegal procurement grounds. *Fedorenko*, 449 U.S. at 521 n.4 (Blackmun, J., concurring).

perjury statutes, 18 U.S.C. 1621 (false statement as to "material matter") and 18 U.S.C. 1623 (false "material declaration" before a court or grand jury), a false statement made before a grand jury is "material" if it

> would have the natural effect or tendency to influence, impede or dissuade the Grand Jury from pursuing its investigation . . . . The false statements need not actually impede the investigation.

United States v. Gremillion, 464 F.2d 901, 905 (5th Cir.), *cert. denied*, 409 U.S. 1085 (1972). *See also United States v. Jackson*, 640 F.2d 614, 616 (8th Cir. 1981) (test is whether the false testimony was "capable of influencing the tribunal on the issue before it"); *United States v. Abrams*, 568 F.2d 411, 420 (5th Cir. 1978) (same); *United States v. DiFonzo*, 603 F.2d 1260, 1266 (7th Cir. 1979) (similar standard under 18 U.S.C. 1001, which is directed against any person who "knowingly and willfully falsifies, conceals or covers up" a "material fact" in a matter within the jurisdiction of a department or agency of the United States).

Most analogously, in the context of criminal prosecutions for visa fraud under 18 U.S.C. 1001 and 18 U.S.C. 1621, a misrepresented fact is "material" if it had "a natural tendency to influence or was capable of influencing the decision . . ." on the visa application. *Robles v. United States*, 279 F.2d 401, 404 (9th Cir. 1960), *cert. denied*, 365 U.S. 836 (1961).[10] Tellingly, the courts have expressly held in these cases that it is *not* required that the government demonstrate "reliance," *i.e.*, that the misrepresentation "actually influenced or caused a

---

[10] *Accord, United States v. Lopez*, 728 F.2d 1359, 1362 (11th Cir.), *cert. denied*, 469 U.S. 828 (1984) ("capacity" to influence decision); *United States v. Ramos*, 725 F.2d 1322, 1324 (11th Cir. 1984) (passport application); *United States v. Valdez*, 594 F.2d 725, 729 (9th Cir. 1979); *Tzantarmas v. United States*, 402 F.2d 163, 168 (9th Cir. 1968), *cert. denied*, 394 U.S. 966 (1969).

department or agency of the United States to act . . . ." *Id.* at 404. *Accord Lopez*, 728 F.2d at 1362.[11]

Because the criminal statutes discussed above provide criminal sanctions, their definition of "material" should, if anything, be *narrower* than in the immigration field. Yet the materiality standard for these criminal cases is significantly broader than the standard that petitioner would have the Court apply under 8 U.S.C. 1451(a). Petitioner's position leads to the absurd result that although one who procures his citizenship by willfully making an important misrepresentation would be immune from the civil consequence of denaturalization unless "ultimate disqualifying facts" can be proven, he would be subject to criminal penalties, including imprisonment, for the very same misrepresentation. In other words, although the individual could be imprisoned for the offense, the likely "fruit" of his crime—his improperly procured citizenship—would be beyond the reach of the law. Congress can hardly have intended such a ludicrous outcome.

2. It follows that a willful misrepresentation made to federal immigration or naturalization authorities and/or to the naturalizing court would be "material" under 8 U.S.C. 1451(a) if disclosure of the true facts (or discovery of the misrepresentation) would have prompted an investigation possibly leading to the discovery of spe-

---

[11] The same rule applies in the criminal law area generally. *See, e.g., United States v. Lichenstein*, 610 F.2d 1272, 1278 (5th Cir.), *cert. denied*, 447 U.S. 907 (1980) (proof that government was "actually influenced" by false statement not required under 18 U.S.C. 1001); *Brandow v. United States*, 268 F.2d 559 (9th Cir. 1959) (same, emphasizing "the intrinsic capabilities of the false statement itself"). Similarly, in the securities field, the Court has held that proof that an omitted fact is material "does not require proof of a substantial likelihood that the disclosure . . . would have caused the reasonable investor to change his vote." *TSC Industries, supra*, 426 U.S. at 449.

cific facts, which facts were capable of influencing the decision on the applicant's visa or naturalization petition.

The test set forth above is fully consistent with the language of the second prong of *Chaunt* and with the pre-*Chaunt* rule, which, as noted previously, required proof of misrepresented or concealed facts that forestalled an investigation relevant to eligibility. It is, moreover, faithful to the Court's instruction in *Chaunt* itself that the "totality of the circumstances" should be taken into consideration when assessing materiality (*Chaunt*, 364 U.S. at 354), and to the common sense understanding that a "material" fact is one that is "important" to the decision-making process. *See, e.g., The New Webster's Comprehensive Dictionary of the English Language* 587 (1985 ed.) (defining "material" as, *inter alia*, "of substantial import; of much consequence; important"). The test proposed by *amicus* would for the first time place limits on the open-ended language of *Chaunt*'s second prong, which, on its face, is otherwise broad enough to encompass virtually any willful misrepresentation or concealment.

Significantly, the test set forth herein would properly prevent the penalization of persons who make minor or unimportant, albeit willful, misrepresentations. For, virtually by definition, no reasonable official could have found such misrepresentations, however purposefully made, important or capable of influencing a visa or naturalization decision. Moreover, the government would still, of course, have to prove that the misrepresentation was a willful one. *Fedorenko*, 449 U.S. at 507-08 n.28. In addition, here, as in the standards applicable to the criminal statutes discussed earlier, built into the test is the requirement that the decision by the vice-consul, naturalization examiner or naturalizing court must have a reasonable basis under the substantive provisions of the immigration and naturalization laws relating to eligibility for immigration and for admission to U.S. citizenship.

II. PETITIONER'S WILLFUL MISREPRESENTATIONS WERE MATERIAL UNDER THE SECOND PRONG OF CHAUNT

A. The District Court Acknowledged that the Government's Investigation of Petitioner, Conducted Forty Years After the Events in Question, Succeeded in Adducing Strong Evidence of Petitioner's Complicity in Nazi Atrocities, Which Petitioner's Misrepresentation of Wartime Residence "Tended to Corroborate"

Applying the appropriate standard, it is clear that petitioner's willful misrepresentations [12] were material under the second prong of *Chaunt*. The district court found that petitioner had willfully misrepresented on his visa application and on his naturalization petition his identity (specifically, his date and place of birth), his wartime occupation, and his wartime residence. The last of these misrepresentations was continued by petitioner throughout the trial of this action, during which he falsely denied to the district court that he had been present in Kedainiai during the time that more than 2,000 unarmed Jewish men, women and children were shot to death there. *United States v. Kungys*, 571 F. Supp. 1104, 1134 (D.N.J. 1983).

Because the district court refused to admit in evidence the deposition testimony identifying petitioner as a participant in the Kedainiai massacres (an evidentiary issue that the Third Circuit found unnecessary to reach),[13]

---

[12] As noted by the Third Circuit, the willfulness of petitioner's misrepresentations is not at issue. *United States v. Kungys*, 793 F.2d 516, 521 (3d Cir. 1986). Petitioner admitted at trial that he had deceived U.S. authorities as to his date and place of birth. *United States v. Kungys*, 571 F. Supp. 1104, 1134 (D.N.J. 1983). As to petitioner's misrepresentation of his wartime whereabouts, willfulness may fairly be presumed from petitioner's having *continued* this deception throughout the trial of the action. *See id.*

[13] 793 F.2d at 520.

the court was unable to determine conclusively whether he had taken part in these killings. Importantly, however, the court held (1) that the government's charges of complicity in these atrocities "find strong support" in three of the depositions (in which the deponents were all self-confessed participants in the killing operation) (571 F. Supp. at 1119), (2) that had that testimony been admitted in evidence, it "would be strong evidence" that petitioner "was an active participant in the killing[s]" (*id.*), and (3) that the "falseness of defendant's [trial] testimony" denying his presence in Kedainiai "would tend to corroborate the evidence of his complicity in the killings" (*id.* at 1134). In addition, in its December 20, 1983 decision denying petitioner's motion for an award of legal fees and expenses, the court held that at the time the government filed suit to revoke petitioner's citizenship, it had "a reasonable basis for the facts alleged in the pleadings" and for believing that it could prove them by "clear, unequivocal and convincing" proof that "does not leave the issue in doubt." *United States v. Kungys*, 575 F. Supp. 1208, 1210 (D.N.J. 1983). In this second decision, the court further stated that had certain steps been taken to test the reliability of the testimony, the government "might have established" that petitioner took part in the mass killings at Kedainiai. *Id.* at 1211.

B. Had Petitioner's Willful Misrepresentations Been Discovered in 1947 or 1953, the Resulting Investigation Would Have Had an Even Greater Chance of Discovering, at a Minimum, the Same Strong Evidence Linking Petitioner to Mass Killings

The district court correctly observed that enormous difficulties are involved in proving details of events that took place in Europe during World War II, as "[s]ome witnesses have died, others are scattered throughout the world . . . ," and surviving "[p]ertinent records and documents likewise are scattered . . . ." *Id.* at 1212. As noted, however, the court held that these nearly insurmountable obstacles notwithstanding, a U.S. government

investigation conducted some forty years after the wartime events in question had succeeded in adducing "strong evidence" of petitioner's complicity in Nazi atrocities, which evidence gave the government a "reasonable basis" for concluding that it could prove such complicity by "clear, unequivocal and convincing evidence," and that, had the depositions been admitted, the government might well have established petitioner's criminal conduct to the court's satisfaction.

Had petitioner's willful misrepresentations been discovered in 1947, when he applied for immigration, or in 1953, when he petitioned the U.S. District Court at Newark for admission to citizenship, there would certainly have been an investigation,[14] one that, for the reasons noted above, would have had a far greater chance of discovering evidence and proving that petitioner took part in wartime atrocities than did the federal investigation which uncovered so much evidence several decades later.

C. Discovery of Strong Evidence of Petitioner's Complicity in Nazi Atrocities Would Plainly Have Been "Capable of Influencing" Official Action on Petitioner's Visa Application and Naturalization Petition, and Accordingly, the Misrepresentations that Prevented the Timely Discovery of Such Evidence are "Material" Under 8 U.S.C. 1451(a)

The question then is whether the fruits of that investigation would have been capable of influencing the decision made on petitioner's visa application or petition for naturalization. As is demonstrated below, the answer most assuredly is yes. An investigation conducted so soon after the war would have been even more likely to have found, at a minimum, the same "strong evidence" provid-

---

[14] As the Third Circuit noted, a former vice-consul who served at the U.S. Consulate at Stuttgart at the time petitioner applied there for his visa and the naturalization examiner who actually handled petitioner's citizenship petition both gave unrebutted testimony that had petitioner's deception been discovered at either stage, an investigation would certainly have been commenced. 793 F.2d at 531, 533.

ing a "reasonable basis" for concluding that petitioner participated in Nazi atrocities, and hence that he was ineligible for entry into the United States (under federal regulations barring the entry of aliens "who had been guilty of, or who had advocated or acquiesced in, activities or conduct contrary to civilization and human decency on behalf of the Axis countries" during World War II)[15] and ineligible for citizenship as well (under federal statutes prohibiting the admission to U.S. citizenship of persons who have entered the United States unlawfully and/or who lack the requisite good moral character).[16] Moreover, as the Third Circuit noted, non-preference visas were to be issued only to "victim[s] of Nazi persecution." 793 F.2d at 530, 531. Accordingly, this "strong evidence" of involvement in Nazi atrocities would have provided an alternate "reasonable basis" for concluding that petitioner had failed to satisfy his burden of proving his eligibility to enter the United States.

Under the definition of "materiality" employed in all analogous areas of federal law—a definition which, as demonstrated above, is the one that should govern the application of *Chaunt* as well—the foregoing facts are plainly "material." A reasonable consular official or naturalization examiner—*i.e.*, one who was making a good faith effort to enforce U.S. law—would surely have found them to be, at the very least, "important" and "capable of influencing" his decision. *See Kungys*, 571 F. Supp. at 1136 (information as to applicant's wartime residences and occupations "tended to indicate the applicant's relationship to the Nazi occupation forces" and hence was "[of] *particular* interest" to U.S. immigration authorities) (emphasis added). Indeed, as the district court held, had the eyewitness testimony been admitted

---

[15] Act of May 23, 1918 (40 Stat. 559), as amended by the Act of June 21, 1941 (55 Stat. 252) and Presidential Proclamation No. 2523 of November 14, 1941 (55 Stat. 1696), 10 Fed. Reg. 8995, 8997, 9000 (1945); 8 C.F.R. 175.52(a), 175.53(j), 175.53(k) (1947s); 22 C.F.R. 58 (1947s).

[16] 8 U.S.C. 1429, 1427(a).

in evidence, the one misrepresentation that petitioner continued at trial—his denial that he was present in Kedainiai at the time of the massacres—would have been of manifest importance to the court's *own* decision (on whether to order petitioner's denaturalization), for that misrepresentation would, in the court's words, "tend to corroborate the evidence of his complicity in the killings." *Id.* at 1134. *A fortiori*, the discovery of that misrepresentation 35 to 40 years ago would have been at least as important to U.S. authorities in deciding upon petitioner's visa application in 1947 and his petition for naturalization in 1953.

CONCLUSION

For the foregoing reasons, *amicus* urges this Court to affirm the decision of the Third Circuit below, and to resolve these issues in a way that makes it clear that a willfully misrepresented or concealed fact is "material" if disclosure of the true facts or discovery of the misrepresentation or concealment would have prompted an investigation possibly leading to the discovery of specific facts, which facts were capable of influencing the decision on the applicant's visa application or petition for naturalization.

Respectfully submitted,

ELI M. ROSENBAUM
(Counsel of Record)
General Counsel
WORLD JEWISH CONGRESS
One Park Avenue
New York, New York 10016
(212) 679-0600
Counsel for Amicus Curiae

Of Counsel
ROBERT H. LANDE
MICHELE L. CYDULKA
JONES, DAY, REAVIS & POGUE
655 15th Street, N.W.
Washington, D.C. 20005
(202) 879-3939

March 4, 1987